



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

duced thereby. Appellees have no right to go upon the right of way and dig ditches and construct bridges or culverts, nor can they be required to do so by appellant. If, however, appellant has constructed obstructions on appellee's land, then they may remove the same, and the jury may consider what would be the cost, and if that would restore the property to its former condition, that would be the depreciation in the value of their land; but if appellant has created such obstructions on its own land, appellees and the jury have the right to regard them as permanent, and the one has the right to claim it as a permanent injury, and the other to allow damages as such."

This decision is valuable for its assertion of the plaintiff's *right* to remove obstructions from his land, as an incident of ownership. Within the limits here indicated, the cost of removal would seem a proper element of damages. The structure should be removable in fact. It should be upon the plaintiff's property and within his power to remove at his option, and the cost of removal should be *reasonable* in proportion to the value of the property. All these, like the question of permanency, are questions of fact. The difficulties all spring from the lack of a complete understanding of the facts.

In fine, the uncertainties of the rule as to future damages are like the uncertainties as to all things future, uncertainties of fact, and in applying the rules of law to torts causing such damages the first step is to classify the tort.

MERRITT STARR.

Chicago.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

LEWIS v. NEW YORK CENT. SLEEPING-CAR COMPANY.

A sleeping-car company is bound to use reasonable care to guard a passenger on its cars from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable.

The fact that the company has posted a notice in its cars, in which it disclaims liability for the loss of valuables by passengers, is not available by way of defence to an action by a passenger whose money, which he had placed beneath the pillow in his berth on going to sleep, was stolen, where it appears that the passenger did not see or know of such notice.

In an action against a sleeping-car company by a passenger, for money stolen from his berth while he was asleep, the fact that another passenger lost a sum of

money in a similar manner at the same time is itself some evidence of the want of proper watchfulness by the porter of the car ; and where there was evidence that the porter was found asleep in the early morning, and that he was required to be on duty for thirty-six hours continuously, which included two nights, a case is presented which must be submitted to the jury to determine whether or not there was negligence on the part of the company in guarding its passengers.

THESE were two actions, each with a count in contract and tort. The count in contract alleged that the defendant, in consideration of the purchase by the plaintiff of a ticket which entitled him to be carried in a sleeping car of the defendant from Albany to Buffalo, undertook to provide plaintiff a berth in said sleeping-car, and to see that said car was properly guarded, and that his personal baggage and effects were protected while he was asleep, but that, while plaintiff was riding in said car, through the negligence of the defendant's servant who was employed by them to care for and watch said car, and protect the baggage and personal effects of the passengers riding therein, the plaintiff's pocket book, and a large sum of money therein, was taken from his person by some person unknown, so that he wholly lost the same. The count in tort alleged the same facts, and claimed damages for the property stolen. At the trial in the Superior Court, before THOMPSON, J., it was agreed that the defendant owned and managed a certain sleeping-car, to wit, the car Pontiac, which was run on the Boston & Albany Railroad and on the New York Central & Hudson River Railroad.

William Lewis, one of the plaintiffs, testified: "I left Boston for San Francisco, October 20th 1884, on the train leaving the Boston and Albany depot at six P. M. This was a regular train, leaving Boston daily, with passengers, bound for San Francisco. I bought sleeping-car tickets of the defendant's agent in the depot at Boston, entitling me to two berths, or one section, in the car Pontiac, between Boston and Chicago, paying \$11 for the same. I occupied the whole section, going to bed about eleven o'clock. I took off only my coat, vest and boots. I folded my vest up, and put it under my pillow, right under my head. In the inside pocket of the vest I had \$200 in bills. The pocket was sewed up securely across the top before I left home. I had sewed it up so that it might be safe when I went to sleep. I felt the money in the pocket of the vest before I went to sleep, which was after leaving Albany, at about half-past one in the morning. I did not wake until five o'clock, when I got up and dressed, putting on my vest. I then went to the wash-room. The train conductor was there. I next

went into the smoking-room at the end of the car. It was so situated that you cannot see the main body of the car from it. When I entered the smoking-room I found the porter there. He was lying down, with his body and head on a short seat, and his feet on the floor, with a blanket rolled over him. I think he was asleep. From the position where he was, no view was to be had of the part of the car where the passengers were asleep. About 5.30, Mr. Wing [the other plaintiff] came into the smoking-room, and said he had been robbed. I examined my vest. I discovered that a slit two or three inches long had been cut in the bottom of the pocket, and all the money taken out. When I discovered the loss, I told the porter about it. He said it must have been a man who got off at a place where we stopped at about four o'clock, because the man gave him five dollars. At a stopping place I told the sleeping-car conductor, who called an official. I told the official I found the fellow asleep. The porter said that he was not asleep, because he talked to the train conductor just before I found him in the smoking-room. I did not see any notice in the wash-room in which the company disclaims responsibility for personal property in berths. It was not light enough in the wash-room for me to read it if I had seen it. I never saw such notices in sleeping-cars. I have frequently travelled on this route to San Francisco—two or four times a year for ten years—taking a sleeping-car each time."

William R. Wing, the other plaintiff, testified that he put his money, when he went to sleep, in the interior compartment of a pocket-book, and put the pocket-book in the inside pocket of his vest, which he put under his pillow; that when he woke up, the money was gone; and that he did not remember seeing any notice in the wash-room in regard to valuables.

It was agreed that (except at stations where the door was locked) the doors at both ends of the car were kept unlocked, and there was no interruption to its passage from one end of the train to the other.

Nathan A. Wheeler, for the defendant, testified that he was eastern division superintendent of the defendant company; that the price charged to everybody on sleeping-cars is the same for the same accommodations; and that no consideration is made in the price in view of the articles or money or valuables which a passenger has.

William F. Ray, conductor of the car Pontiac, testified that he

took charge of the car at Albany; that the porter is on duty from Boston to Chicago; that the duties of the porter are to look after the car and his passengers, black boots and to stay awake; that there were notices about responsibility for valuables at each end of the car, in the gentlemen's and ladies' wash-rooms, directly over the wash-stand; and that the porter's pay is \$25 a month, he finding his own board.

It was admitted by the defendant that there was no receptacle for valuables or other property furnished by the defendant, and that its servants are forbidden to take possession of any such articles.

This comprised all the material evidence, and at its close the defendant's counsel asked for certain rulings, as follows: (1) That there is no evidence upon which the jury can find any contract or obligation on the part of the defendant to watch and care for or protect the money of the plaintiff; (2) that there is no evidence upon which the jury can find that the loss occurred through the negligence of the defendant; (3) that the absence of the porter from the aisle of the car, as testified to by Lewis, is the only evidence of negligence on the part of the defendant; and that evidence is not sufficient to justify a verdict for the plaintiff, the absence being after the loss occurred.

The court refused so to rule, but instructed the jury as follows: That "the defendant corporation, in furnishing sleeping-cars for the travelling public, is not to be regarded as an innkeeper, or as a common carrier. Those are insurers of the property. But it is bound to exercise care to prevent thefts of goods and money from the person of one to whom it has furnished a berth for hire in the ordinary course of its business, either from unauthorized intruders or by occupants of the car. The company may be liable for such articles as a passenger usually carries about his person, and for such sum of money as may be reasonable and necessary for travelling expenses, providing the same is lost by want of ordinary care on the part of the defendant, or its servants in not exercising such care."

Upon the question of whether the evidence tended to show negligence on the part of the defendant which would justify the jury in finding that the loss occurred through the negligence of the defendant the court instructed the jury as follows: "You are to say, under all the circumstances of this case, whether or not the defendant corporation, on the night in question, in the sleeping-car Pon-

tiac, exercised ordinary care to protect the persons occupying the berths there from larceny. You will determine what, under the circumstances, would be ordinary care,—not extraordinary care,—not to keep such a condition of things as to render it impossible for a theft to occur,—but taking into consideration the business, the construction of the car, the situation of the berths ; and on all the facts you are to say what would be reasonable care. If you find that the defendant did exercise ordinary care, then it is not responsible to the plaintiffs, or either of them. If you find that defendant did not exercise ordinary care, then you will go further, and ascertain whether the theft was the result of the want of such ordinary care. If you find it was the result of the want of ordinary care on the part of the defendant, and the plaintiffs were themselves in the exercise of due care, then the defendant would be answerable for the whole, or such part of the money lost as it was reasonable and necessary for these parties to have, taking them as travellers upon the journey that they were going, and having regard to the ordinary liabilities and expenses contingent upon such a trip.”

The jury returned a verdict for the plaintiff in each case, and the defendant alleged exceptions.

C. W. Clifford, W. Clifford and H. H. Crapo, for defendant.

H. M. Knowlton and A. E. Perry, for plaintiffs.

The opinion of the court was delivered by

MORTON, C. J.—The use of sleeping cars upon railroads is modern, and there are few adjudicated cases as to the extent of the duties and liabilities of the owners of such cars. They must be ascertained by applying to the new condition of things, the comprehensive and elastic principles of the common law. When a person buys the right to the use of a berth in a sleeping-car, it is entirely clear that the ticket which he receives is not intended to and does not express all the terms of the contract into which he enters. Such ticket, like the ordinary railroad ticket, is little more than a symbol intended to show to the agents in charge of the car that the possessor has entered into a contract with the company owning the car, by which he is entitled to passage in the car named on the ticket. Ordinarily, the only communication between the parties is that the passenger buys, and the agent of the car company sells a ticket between two points ; but the contract thereby entered into is implied from the nature and usages of the employment of the company.

A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars; and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for and make use of its cars for sleeping; all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself, or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping-car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise.

The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innholder, yet it is its clear duty to use reasonable care to guard the passengers from theft; and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy and by the true interests of both the passenger and the company; and the decided weight of authority supports it. *Woodruff S., &c., C. Co. v. Diehl*, 84 Ind. 474; *Pullman Palace Car Co. v. Gardner*, 3 Penny. 78; *Same v. Gaylord*, 23 Amer. Law Reg. (N. S.) 788.

The notice by which the defendant company sought to avoid its liability was not known to the plaintiff, and cannot avail the defendant.

The defendant contends that there was no evidence of negligence on its part. The fact that two larcenies were committed in the manner described in the testimony is itself some evidence of the want of proper watchfulness by the porter of the car. Add to this the testimony that the porter was found asleep in the early morning, that he was required to be on duty for thirty-six hours continuously, which includes two nights—and a case is presented which must be submitted to the jury.

We have considered all the questions which have been argued in the two cases before us, and are of opinion that the rulings at the trial were correct.

Exceptions overruled.

It appears to be well settled that sleeping-car companies are to be regarded neither as innkeepers nor common car-

riers, and hence are not subject to the onerous liabilities of either in respect to the property of those enjoying their ac-

commodations: *Dargan v. Pullman Palace Car Co.*, 2 Wilson (Tex. Ct. of App. Civ. Cas.) 607; *Blum v. Southern Pullman Palace Car Co.*, 3 Cent. L. J. 591; s. c. 1 Flip. 500; *Pullman Palace Car Co. v. Gaylord*, 23 Am. L. Reg. (N.S.) 788; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. (N. S.) 352; s. c. 1 Sheld. (N. Y. Super. Ct.) 457; *Palmeter v. Wagner*, 11 Alb. L. J. 149; Thompson on Carriers, p. 530, § 20.

It is, however, equally well settled that it is the duty of such companies to exercise reasonable and ordinary care for the security of the property of their passengers; and what is ordinary care must be measured with reference to the danger reasonably to be apprehended. Such danger is greater at night while the passenger is asleep than in the day time when he is awake and can care for himself. The invitation to make use of a berth carries with it an invitation to sleep and an implied agreement to take reasonable care of the passenger's effects while he is asleep; a failure to use ordinary care proportionate to the danger reasonably to be apprehended, would be such negligence as would ordinarily render such a company liable for the loss of the passenger's property. The gist, therefore, of the liability of such a company is negligence: *Dargan v. Pullman Palace Car Co.*, *supra*; *Pfaelzer v. Pullman Palace Car Co.*, 4 Weekly Notes Cases 240; *Palmeter v. Wagner*, 11 Alb. L. J. 149; *Blum v. Southern Pullman Palace Car Co.*, 3 Cent. L. J. 591; *Pullman Palace Car Co. v. Gaylord*, 23 Am. L. Reg. (N. S.) 788; *Keith v. Pullman Palace Car Co.*, 17 Chic. L. News 196; *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind. 474; Thompson on Carriers, p. 530, § 20.

Such liability will extend to the loss of such articles as a passenger usually carries about his person, and such sum of money as may be reasonably necessary for his travelling expenses: *Blum v. Southern Pullman Palace Car Co.*, *supra*; *Pullman Palace Car Co. v. Gaylord*, 23 Am. L. Reg. (N. S.) 788 (a diamond scarf pin worth \$300); *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind. 474.

The fact, however, that the palace car company is not liable as a common carrier does not relieve the railway company from which the passenger purchased his ticket from its usual common-law liability. In the case of *L. & N. & G. S. Rd. v. Katzenberger*, 1 S. W. Rep. 44, the Supreme Court of Tennessee held that the liability of the railway company to the passenger continues even when the passenger takes his baggage into a sleeping-car and gives it into the charge of the porter thereof; and that a railway company cannot limit its liability by any special arrangement with the sleeping-car company, because so long as the sleeper forms part of the train, negligence on the part of the sleeping-car agents is the negligence of the railway company running the train. To the same effect see *Kinsley v. Lake Shore, &c., Rd.*, 125 Mass. 54.

The ground of liability of a sleeping-car company being, as we have seen above, negligence, there would seem to be no doubt as to the correctness of the decision of the court in the principal case. In that case the evidence of negligence seems to be entirely sufficient to sustain the verdict of the jury.

MARSHALL D. EWELL.

Chicago.